SHER TREMONTE LLP

September 19, 2016

VIA ECF

The Honorable P. Kevin Castel
United States District Judge
United States District Court for the Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, NY 10007

Re: *United States v. Gary Hirst*, 15 Cr. 643(PKC)

Dear Judge Castel:

We write to respectfully request the following modifications to the Court's proposed jury charge. We incorporate by reference the objections and requests previously filed on June 28, 2016.

Name of Defendant

We ask that the Court replace the word "defendant" with "Gary Hirst" or "Mr. Hirst" throughout its charge.

Burden of Proof

We ask that the Court replace its "Burden of proof" section with two sections entitled "Presumption of Innocence" and "Reasonable doubt." Our proposed modifications are as follows:

Presumption of Innocence

Mr. Hirst has entered a plea of not guilty to the Indictment. As a result of Mr. Hirst's plea of not guilty, the burden is on the Government to prove his guilt beyond a reasonable doubt. The burden never shifts to Mr. Hirst for the simple reason that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

The presumption of innocence was with Mr. Hirst when the trial began. It remains with him even now as I speak to you, and it will continue with him into your deliberations. The presumption of innocence alone requires you to acquit Mr. Hirst unless and until, after careful and impartial consideration

> of all the evidence or lack of evidence in this case, you, as jurors, are convinced unanimously of his guilt beyond a reasonable doubt.
>
> If the prosecution fails to sustain its burden of proof beyond a reasonable doubt, you must find Mr. Hirst not guilty.
>
> *Reasonable Doubt*
>
> The question that naturally comes up is: what is a reasonable doubt? The words almost define themselves. It is a doubt based upon reason and common sense, arising out of the evidence, the nature of the evidence, or the lack of evidence, in the case. It is doubt which would cause a reasonable person to hesitate to act in a matter of the highest importance in his or her personal life. Proof beyond a reasonable doubt must therefore be proof of such a convincing nature that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs. The burden of proof, here, is at all times upon the prosecution to prove guilt beyond a reasonable doubt. It must satisfy this burden as to each and every element of the crimes charged. This burden never shifts to Mr. Hirst. The law never imposes upon a defendant in a criminal case the burden of calling any witnesses or producing any evidence. The fact that one party called more witnesses and introduced more evidence does not mean that you should find in favor of that party. Even if Mr. Hirst has presented evidence in his defense, it is not his burden to prove himself not guilty. It is always the Government's burden to prove each of the elements of the crimes charged beyond a reasonable doubt.
>
> If, after a fair, impartial and careful consideration of all the evidence and lack of evidence, you are satisfied of Mr. Hirst's guilt with respect to a particular charge against him, you should vote to convict. On the other hand, if after fair and impartial consideration of all the evidence and lack of evidence, you can say that you are not satisfied of Mr. Hirst's guilt beyond a reasonable doubt- that is, if you have such a doubt as would cause you, as a prudent person, to hesitate before acting in matters of importance to yourself - then you have a reasonable doubt. In that circumstance, it is your duty to acquit.

In particular, we ask that the following paragraph in the Court's original charge be deleted:

> Reasonable doubt is a doubt that appeals to your reason, your judgment, your experience, your common sense. It is not caprice, whim or speculation. It is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for a defendant.

These sentences could easily, albeit unwittingly, negate the preceding sentences that properly define the proof beyond a reasonable doubt standard as a significant one. Furthermore, they are unnecessary given the preceding language that guides jurors that a reasonable doubt is one based upon reason and common sense.

In addition, we believe the instruction should emphasize that the burden of proof never shifts, even when the defense presents evidence in his defense. The proposed revisions include language to that effect.

In the final paragraph, the order of the sentences has been shifted so that conviction is mentioned before acquittal. In the light of the central role this standard of proof plays in our system of justice, the proposed modification is necessary. If the last option the Court provides is conviction, it will undercut the importance of the Government's burden.

Direct and Circumstantial Evidence

We respectfully request that the Court modify its standard charge concerning direct and circumstantial evidence, particularly insofar as it recites the "wet umbrella" hypothetical. We believe that hypothetical oversimplifies the competing inferences that can be drawn from circumstantial evidence. *See United States v. Morrison*, 04-cr-699 (DHH) (modified rain example allowing for possibility that rain stopped). Accordingly, we respectfully request that the Court charge the jury as follows:

> Assume that when you came into the courthouse this morning the sun was shining and it was a nice day. Assume further that the courtroom windows were covered and you could not look outside. As you were sitting here, assume that someone walked in with an umbrella, which was dripping wet. Then, a few minutes later, another person entered with a wet raincoat. Now, you cannot look outside of the courtroom and you cannot see whether or not it is raining. So you have no direct evidence of that fact. But, on the combination of facts that I have asked you to assume, you may infer that it is raining outside. On the other hand, that inference might be incorrect because it may have stopped raining before those people entered the courtroom. In other words, the fact of rain is an inference that could be drawn from the wet raincoat and dripping umbrella, but need not be. Each of you, as jurors must be guided by your own common sense, experience or judgment in determining what inference is justified or reasonable under all the circumstances presented.

In addition, we believe that the jury should be instructed that if the evidence gives equal circumstantial support to a theory of guilt and a theory of innocence, then the jury must find Mr. Hirst not guilty. *See United States v. Glenn*, 312 F.3d 58, 70 (2d Cir. 2002) (finding that, because "the Government's evidence gave 'nearly equal circumstantial support' to competing explanations for [a victim's death]," one consistent with the defendant's guilt and the other consistent with the defendant's innocence, "the Government's evidence failed to establish [the defendant's] guilt beyond a reasonable doubt"). Our proposed language is as follows:

> You are to consider both direct and circumstantial evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence. The law requires that before Mr. Hirst may be convicted, you, the jury, must be satisfied that the Government has proved his guilt on a particular charge beyond a reasonable doubt after review of all the evidence in this case, direct and circumstantial. If you find that the evidence gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence on a particular charge, then you must find Mr. Hirst not guilty of that charge.

Law Enforcement Witnesses

We are unaware of any law enforcement witness who will testify (except for a summary witness who will read aloud certain emails), and so we propose deleting the paragraph relating to the jury's consideration of such testimony.

Accomplice or Cooperating Witnesses

We believe that corrections to the proposed charge are necessary to reflect the particular facts of this case. Here, the two cooperating witnesses who will testify did not in fact plead guilty to the same charges faced by Mr. Hirst. In addition, given that the jury will know that others have been charged in this case, we believe that certain language modifications to this section are appropriate and propose the following instruction:

> You have heard testimony from Government witnesses who pleaded guilty to similar charges and entered into cooperation agreements with the Government. These witnesses have agreed to testify and to cooperate with the Government in exchange for the Government's agreement to ask the Court to give them a lighter sentence than they would otherwise receive. You are instructed that you must not draw any conclusions or inferences of any kind about Mr. Hirst's guilt from the fact that a prosecution witness pled guilty to similar charges. The decision of each witness to plead guilty was a personal decision about his or her own guilt. It may not be used by you in any way as evidence against or unfavorable to Mr. Hirst. A witness's decision to cooperate with the Government is not evidence that Mr. Hirst committed a crime. Mr. Hirst cannot be found guilty simply based on his association with individuals who decided to plead guilty or to cooperate with the Government.

> The law allows the use of cooperating witness testimony. You may consider this testimony, along with all of the other evidence, or lack of evidence, in this case in determining whether the Government has met its burden to prove Mr. Hirst's guilt beyond a reasonable doubt.
>
> However, because of the possible interest a cooperating witness may have in testifying, a cooperating witness's testimony should be scrutinized with special care and caution. The fact that a witness testifying in exchange for the Government's agreement to ask the Court to give them a lighter sentence than they would otherwise receive can be considered by you as bearing upon his or her credibility. The fact that a witness has pled guilty to similar charges may also be considered by you as bearing upon his credibility. However, it does not follow that simply because a person has admitted participating in one or more crimes, he or she is incapable of telling the truth about what happened.
>
> The testimony of a cooperating witness should be given such weight as it deserves in light of the facts and circumstances before you, taking into account the witness's demeanor and candor, the strength and accuracy of his or her recollection, his or her background, and the extent to which his or her testimony is or is not corroborated by other evidence in the case.
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> You may consider whether a cooperating witness — like any other witness called in this case — has an interest in the outcome of the case, and if so, whether it has affected his or her testimony. You should bear in mind that a witness who has entered into a cooperation agreement with the Government has an interest and motives different from those of other witnesses. In evaluating the testimony of cooperating witnesses, you should ask yourselves whether these accomplices would benefit more by lying, or by telling the truth. Was the witness's testimony made up in any way because he believed or hoped that he would somehow receive favorable treatment by testifying falsely? Or did he believe that his interests would be best served by testifying truthfully? If you believe that the witness was motivated by hopes of avoiding severe criminal penalties, was the motivation one that would cause him to lie, or was it one that would cause him to tell the truth? Did this motivation color his testimony?
>
> You should consider all of the evidence and lack of evidence in deciding what weight, if any, to give to the testimony of a cooperating witness. If you find that the testimony of a cooperating witness was false, you should reject it.
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> However, if, after a cautious and careful examination of a cooperating witness's testimony and demeanor on the witness stand, in light of all the evidence and lack of evidence, you are satisfied that the cooperating witness

> told the truth, you may accept as much of the testimony as you find credible and give it whatever weight, if any, you find it deserves.

Formal/Informal Immunity of Government Witnesses

We ask that this section be deleted since there are no government witnesses who received formal or informal immunity.

Preparation of Witnesses

We ask that the section concerning preparation of witnesses be deleted as inapplicable.

Persons Not on Trial

In light of the fact that the jury will hear that others were charged in connection with the events at issue in this case, we respectfully request that following the Court's statement, "You also may not speculate as to the reasons why other persons are not on trial," the Court add, "Nor may you consider the fact that the Government has charged others who are not being tried in this trial."

Defendant's Right to Testify and Right Not to Testify

We ask that the Court modify its proposed language relating to a defendant's right not to testify (if applicable) to include the many reasons why a defendant may not take the stand:

> You may not speculate as to why Mr. Hirst did not testify. There are many reasons why a defendant may decide not to testify. A defendant may feel because of the strain of being a witness, the tension, that he may not be calm. A defendant may be embarrassed by his inability to speak well in front of a group of people. You are not to speculate as to these things. You may not draw any inference whatsoever from Mr. Hirst's decision not to take the stand.

In addition, we propose the following charge concerning Mr. Hirst's right to testify (if applicable):

> The defendant in a criminal case never has any duty to testify or come forward with any evidence. This is because, as I have told you, the burden of proof remains on the Government at all times, and the defendant is presumed innocent. In this case, Mr. Hirst did testify and he was subject to cross-examination like any other witness. The fact that he testified does not in any way remove or lessen the burden on the Government to prove the charges against him beyond a reasonable doubt. Mr. Hirst did not have to

> testify and, in fact, did not have to present any evidence whatsoever. You should examine and evaluate Mr. Hirst's testimony just as you would the testimony of any other witness. You should not disregard or disbelieve his testimony simply because he is charged as a defendant in this case. I also remind you that Mr. Hirst's decision to testify does not in any way shift the burden of proof to him. Do not ask yourself whether his testimony convinces you that he is not guilty. You must consider all the evidence and lack of evidence presented, and then ask yourselves whether or not the Government has proven the charges contained in the Indictment beyond a reasonable doubt.

See United States v. Brutus, 505 F.3d 80, 88 n.7 (2d Cir. 2007); Government's Request to Charge, *United States v. Soto*, No. 12-cr-556 (RPP) (S.D.N.Y. Sept. 13, 2013), ECF No. 147.

Use of Recordings and E-Mails

We propose minor modifications to the Court's language to reflect that only one recorded call will be introduced and no text messages.

Particular Investigative Techniques Not Required

Mr. Hirst objects to this proposed instruction in its entirety on the ground that it does not explain a legal principle that the jury needs to understand in order to resolve the case. Rather, it represents improper judicial commentary on the evidence and improperly bolsters the Government's case. While it is within the Court's discretion to instruct the jury that there is no legal requirement that the Government use any specific investigative techniques to prove its case, jurors should not be instructed that law enforcement techniques are "not [their] concern."

On the contrary, the Supreme Court has recognized that it is a common and legitimate defense strategy "to discredit the caliber of the investigation or the decision to charge the defendant." *Kyles v. Whitley*, 514 U.S. 419, 446 (1995) (finding a *Brady* violation where state withheld information that could have been used at trial to attack the police investigation); *Alvarez v. Ercole*, 763 F.3d 223, 232 (2d Cir. 2014) (finding Confrontation Clause violation where court prevented defense counsel from cross-examining detective about unpursued leads). If the Court decides to give an instruction concerning investigative techniques, we respectfully request that the Court use our proposed instruction, which is as follows:

> You have heard references in the arguments in this case to the fact that certain investigative techniques were used by the government and that certain others were not used. There is no legal requirement that the Government use any specific investigative techniques to prove its case. However, you may consider these facts in deciding whether the

> Government has met is burden to prove its case beyond a reasonable doubt because, as I told you, you should look to all of the evidence and lack of evidence in deciding whether the defendant is guilty or not guilty.

Summary of the Indictment

We ask that the following language be added after the first sentence to emphasize that the number of counts is immaterial: "You should know that there is no significance to the specific number of counts charged or to the order of these counts."

We also request that the last paragraph in this section be modified to emphasize that each count should be considered separately. Accordingly, we propose the following language:

> That is a summary of all four counts in the Indictment. You must consider each individual count separately, and evaluate each on the evidence or lack of evidence that relates to that count. Whether you find Mr. Hirst guilty or not guilty as to one count should not affect your verdict as to any other count.

Existence of the Conspiracy

We propose the following language with respect to Conspiracy to Commit Securities Fraud – First Element: Existence of the Conspiracy:

> The first element which the government must prove beyond a reasonable doubt is that a conspiracy actually existed. A conspiracy is an agreement or an understanding, between two or more persons, to accomplish by joint action a criminal or unlawful purpose. The goal of the agreement must itself be illegal. Proof of an agreement to achieve a lawful goal is not sufficient. Rather, the government must establish an agreement to achieve unlawful goals and to do so by illegal means.
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> The government must prove, beyond a reasonable doubt, that there was an agreement with respect to the essentials of the plan. Whether there is proof of such a deliberate agreement by the alleged members of the conspiracy to engage in specified unlawful conduct should be central to your consideration of the charged conspiracy. Proof that people simply met together and talked about common concerns, or engaged in similar conduct, is not enough to establish criminal agreement. Also, a person who doesn't know about a conspiracy but happens to act in a way that advances some purpose of one doesn't automatically become a conspirator.
>
> When people enter into a conspiracy to accomplish an unlawful end, they become agents and partners of one another in carrying out the conspiracy.

> In determining whether there has been an unlawful agreement as alleged, you may consider the acts and conduct of the alleged co-conspirators that were done to carry out the apparent criminal purpose.
>
> In determining whether such an agreement existed, you may consider direct as well as circumstantial evidence. You may find the existence of an agreement to disobey or disregard the law has been established by direct proof. Since conspiracy is, by its very nature, characterized by secrecy, you may infer, after considering all of the circumstances in this case and the conduct of the parties involved, that the conspiracy charged in the Indictment existed.
>
> The old adage, "Actions speak louder than words," applies here. Often, the only evidence that is available with respect to the existence of a conspiracy is that of disconnected acts and conduct on the part of the alleged individual co-conspirators. You may find that these acts and conduct warrant the inference that a conspiracy existed. On the other hand, you may also find that the acts and conduct of the alleged individual co-conspirators do not warrant such an inference. Whether or not the alleged conspiracy existed is a fact issue for you to decide.
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> So, you must first determine whether the conspiracy charged in Count One of the Indictment existed. To establish the existence of the conspiracy, the government must prove beyond a reasonable doubt that the minds of at least two alleged co-conspirators met to violate the law in the manner charged in the Indictment.

See United States v. Ali, 561 F. Supp. 2d 265 (E.D.N.Y. 2008) (defendants' agreement to engage in lawful conduct not evidence of plan to achieve illegal goal); *United States v. Martoma*, No. 12-cr-973 (PGG) (Tr. 3202-05); *United States v. Harris*, No. 09-cr-406 (TCB) (N.D. Ga. May 31, 2011), ECF No. 216; L. Sand et al., Modern Federal Jury Instructions, Instruction 19-4 (modified).

Object of the Conspiracy

We propose the following language with respect to the object of the conspiracy, after the first sentence of the Court's paragraph that beings "The second thing made unlawful . . .":

> First, you must determine whether the statement was true or false when it was made and, in the case of alleged omissions, whether the omission was misleading. If you find that the Government has established beyond a reasonable doubt that a statement was false or a statement was omitted in a way that was misleading, you must next determine whether the fact misstated or omitted was material under the circumstances. We use the word

> "material" to distinguish between the kinds of statements we care about and those that are of no real importance. A material fact is one that a reasonable person might have considered important in making his or her investment decision. That means if you find a particular statement of fact or omission to have been untruthful or misleading, before you can find that statement or omission to be material, you must also find that the statement or omission was one that would have mattered to a reasonable person in making such an investment decision.

Adapted from L. Sand et al., Modern Federal Jury Instructions, Instruction 57-15.

Membership in the Conspiracy – Willfully and Knowingly

We propose the following language for this charge in order to make clear that to satisfy this element, the jury must find beyond a reasonable doubt that Mr. Hirst had the specific intent to further the unlawful goals of the conspiracy:

> The term "knowingly" means that you must be satisfied beyond a reasonable doubt that in joining the conspiracy (if you find that Mr. Hirst did join the conspiracy), Mr. Hirst knew what he was doing. An act is done "knowingly" if it is done deliberately and purposely — that is, Mr. Hirst's actions must have been his conscious objective rather than a product of a mistake or accident, mere negligence, or some other innocent reason.
>
> An act is done "willfully" if it is done voluntarily and in intentional violation of a legal duty. A defendant does not act willfully if he is merely careless; he must intend to violate the law.
>
> To satisfy its burden of proof that Mr. Hirst willfully and knowingly became a member of the conspiracy to accomplish an unlawful purpose, the Government must prove beyond a reasonable doubt that Mr. Hirst knew that he was a member of an operation or conspiracy to accomplish that unlawful purpose, and that his action of joining such an operation or conspiracy was not due to carelessness, negligence, or mistake.
>
> The key question, therefore, is whether Mr. Hirst joined the conspiracy with an awareness of the basic aims and purposes of the unlawful agreement. Mr. Hirst's participation in the conspiracy must be established by independent evidence of his own acts or statements.
>
> I want to caution you that a person's mere association with a member of a conspiracy does not make that person a member of the conspiracy, even when that association is coupled with knowledge that a conspiracy is taking place. Mere presence at the scene of a crime, even coupled with knowledge that a crime is taking place, does not, in itself, make a person a member of

> the alleged conspiracy or a conspirator. Similarly, a person may know, assemble with, be friendly with, or do business with one or more members of a conspiracy, without being a conspirator himself. In other words, knowledge or acquiescence without agreement and participation is not sufficient.
>
> In addition, if Mr. Hirst's acts, without knowledge, merely happened to further the purposes or objectives of the conspiracy, that does not mean that Mr. Hirst is a member of the conspiracy. More is required under the law. The Government must prove beyond a reasonable doubt that Mr. Hirst participated in the conspiracy with knowledge of at least some of the purposes or objects of the conspiracy, and with a specific intent to aid in the accomplishment of its unlawful objective.
>
> In sum, you may not find Mr. Hirst guilty of participating in the alleged conspiracy unless you find that he, with an understanding of the unlawful character of the conspiracy, intentionally participated in the alleged conspiracy for the purpose of furthering the illegal undertaking. His participation must have been deliberate and intentional, not merely inadvertent, negligent, or innocent. His participation must also have been with knowledge that the objects of the conspiracy were illegal and with the specific intent to further those illegal objects.

See United States v. Lorenzo, 534 F.3d 153, 160 (2d Cir. 2008) (reversing conviction where, even though there was "ample evidence that [the defendant] was present at and participated in events that furthered the conspiracy, there is insufficient evidence to show that he did so knowingly and with the specific intent to further a . . . conspiracy").

Liability for Acts and Declarations of Co-Conspirators

Given that there is a risk here that the proof of the substantive acts may overwhelm the evidence relating to whether there was in fact an actual conspiracy and whether Mr. Hirst joined the conspiracy, we propose adding to the end of the second-to-last paragraph of the Court's charge, which begins "If you find, beyond a reasonable doubt, that the defendant was a member of the conspiracy" the following:

> Mr. Hirst may only be held liable, however, for the acts and declarations of co-conspirators that were reasonably foreseeable to him, and, as I have instructed you, in order to find Mr. Hirst so liable, you must first find the existence of a conspiracy and that Mr. Hirst knowingly and willfully joined that conspiracy. The acts and declarations of others cannot on their own establish the existence of the conspiracy or that Mr. Hirst joined the conspiracy, knowing of its unlawful aims and intending that they succeed.

Purpose of the Securities Fraud Statute

We object to this instruction in its entirety on the ground that it does not explain a legal principle that the jury needs to understand in order to resolve the case. Given its length and detail, it also poses a substantial risk of confusing and misleading the jury. Such an instruction is by no means required and has not been given in recent cases. *See* Jury Instructions, *United States v. Bonventre*, 10-cr-228 (LTS) (S.D.N.Y. Mar. 17, 2014), ECF No. 773; *United States v. Martoma*, No. 12-cr-973 (PGG).

Count Two: Securities Fraud – Elements of the Offense

We ask that the Court add the language "the government must prove beyond a reasonable doubt" in each paragraph establishing the elements.

Knowledge, Intent and Willfulness

We ask that the Court provide the jury with the following charge concerning knowledge, intent and willfulness, in particular as it relates to the "good faith" defense:

> The second element of Count Two that the Government must prove beyond a reasonable doubt is that Mr. Hirst acted knowingly, willfully and with intent to defraud.
>
> "Knowingly" means to act intentionally, voluntarily and deliberately, and not because of ignorance, mistake, accident, or carelessness.
>
> "Willfully" means to act deliberately and with an intent to do something the law forbids, that is to say, with bad purpose either to disobey or to disregard the law.
>
> "Intent to defraud" in the context of the securities laws means to act knowingly and with intent to deceive. For Mr. Hirst to have acted with the specific intent to defraud means that he must have known of the fraudulent nature of the scheme and acted with the intent that it succeed.
>
> The question of whether a person acted knowingly, willfully and with intent to defraud is a question of fact for you to determine, like any other fact question. This question involves one's state of mind.
>
> Knowledge and fraudulent intent may be established by direct proof or by circumstantial evidence, based upon a person's outward manifestations, his words, his conduct, his acts and all the surrounding circumstances disclosed by the evidence and the rational or logical inferences that may be drawn therefrom.

> Circumstantial evidence, if believed, is of no less value than direct evidence. In either case, the essential elements of the crime charged must be established beyond a reasonable doubt.
>
> At this point, let me advise you that since an essential element of the crime charged is intent to defraud, it follows that "good faith," as I will define that term, on the part of a defendant is a complete defense to a charge of securities fraud. A person who acts on a belief or opinion honestly held is not punishable under the securities fraud statutes merely because his opinion or belief turns out to be wrong.
>
> If you find that, at all relevant times, Mr. Hirst acted in good faith, it is your duty to acquit him. The law is not violated where a defendant acted in good faith and held an honest belief that his actions were proper and not in furtherance of an illegal venture. I want to caution you in this regard that Mr. Hirst has no burden to establish the defense of good faith. The burden is on the Government to prove criminal intent and consequent lack of good faith beyond a reasonable doubt. If you find that Mr. Hirst was not a knowing participant in the scheme and lacked intent to defraud, you must acquit him.
>
> As a practical matter, then, to prove this charge against Mr. Hirst, the Government must establish beyond a reasonable doubt that Mr. Hirst knew that his conduct was calculated to deceive and that he nevertheless associated himself with the alleged fraudulent scheme.
>
> The Government may prove that Mr. Hirst acted knowingly and willfully if the evidence satisfies you beyond a reasonable doubt that Mr. Hirst was actually aware that he was making or causing a false statement to be made, or omitting, or causing to be omitted, a material fact. However, if you have a reasonable doubt that Mr. Hirst was actually aware that he was making or causing a false statement to be made, or omitting or causing to be omitted a material fact, you must acquit him.

Adapted from *United States v. Martoma*, No. 12-cr-973 (PGG) (Tr. 3195-97).

Conscious Avoidance

We continue to object to any "conscious avoidance" instruction in this case. The evidence will not support such an instruction. We respectfully request that the Court wait until the evidence has been presented to the jury before determining whether such an instruction is appropriate. If the Court ultimately determines that a conscious avoidance instruction is appropriate, we respectfully request permission to propose a charge at that time.

Wire Fraud -- First Element: Existence of Scheme or Artifice to Defraud

We propose the following language with respect to the existence of a scheme to defraud:

> The first element of Count Four that the Government must prove beyond a reasonable doubt is the existence of a scheme or artifice to defraud others of money or property by means of false or fraudulent pretenses, representations, or promises.
>
> A "scheme or artifice" is a plan for the accomplishment of an object. "Fraud" is a general term. It is a term that includes all the possible means by which a person seeks to gain some unfair advantage over another person by false representations, false suggestion, false pretenses, or concealment of the truth. The unfair advantage sought can involve money, property, or any other thing of value.
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> Thus, a "scheme to defraud" is any plan, device, or course of action to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises. It is a plan to deprive another of money or property by trick, deceit, deception, or swindle.
>
> A scheme to defraud need not be shown by direct evidence, but may be established by all the circumstances and facts in the case, if such facts are proven beyond a reasonable doubt.
>
> A "pretense, representation, or statement" is fraudulent if it was untrue when made and was known to be untrue, at the time it was made, by the person making it or causing it to be made, and if it was made with intent to deceive. A statement may also be fraudulent if it conceals material facts in a manner that makes what is said or represented deliberately and materially misleading.
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> The failure to disclose information may also constitute a fraudulent representation if the defendant was under a legal, professional or contractual duty to make such a disclosure, the defendant actually knew such disclosure was required to be made, and the defendant failed to make such disclosure with the intent to defraud.
>
> The false or fraudulent representation or concealment must relate to a material fact or matter. I have previously explained that a material fact is one that would reasonably be expected to be of concern to a reasonable and prudent person in relying upon the representation or statement in making a decision. That means that, if you find a particular statement or representation false, you must determine whether that statement or

> representation was one that a reasonable person might have considered important in making his or her decision. The same principle applies to omissions, that is, failures to disclose facts.
>
> In order to satisfy this first element, in addition to proving that a statement was false and related to a material fact, the Government must also prove that the alleged scheme contemplated depriving another of money or property. It is not necessary for the Government to establish that Mr. Hirst actually realized any gain from the scheme or that any particular person actually suffered any loss as a consequence of the fraudulent scheme. Although whether or not the scheme succeeded is not really the question, you may consider whether it succeeded in determining whether the scheme existed.
>
> If you find that the Government has sustained its burden of proof beyond a reasonable doubt that a scheme to defraud did exist, as charged, you next should consider the second element.

Adapted from L. Sand et al., Modern Federal Jury Instructions, Instruction 44-4 and Jury Instructions, *United States v. Bonventre*, 10-cr-228 (LTS) (S.D.N.Y. Mar. 17, 2014), ECF No. 773.

Aiding and Abetting

We propose that the Court give the following language for the aiding and abetting charge, adapted from L. Sand et al., Modern Federal Jury Instructions, Instruction 11-2:

> Each of the substantive counts charged in the Indictment -the securities fraud charge in Count Two and the wire fraud charge in Count Four - also charges Mr. Hirst with violating 18 U.S.C. § 2, the "aiding and abetting" statute. That is, Mr. Hirst is charged not only as a principal who committed the crime, but also as an aider and abettor and with having willfully caused the crime. As a result, under 18 U.S.C. § 2, there are two additional ways that the Government may establish Mr. Hirst's guilt on the substantive counts charged in the Indictment. One way is called "aiding and abetting," and the other is called "willfully causing a crime." Let me explain each of these.
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> "Aiding and abetting" is set forth in Section 2(a) of the statute. That section reads, in part, as follows:
>
> Whoever commits an offense against the United States or aids or abets or counsels, commands or induces, or procures its commission, is punishable as a principal.

Under the aiding and abetting statute, you may find Mr. Hirst guilty of the substantive crime if the Government has proved beyond a reasonable doubt that another person actually committed the crime, and the government has proved beyond a reasonable doubt that Mr. Hirst aided and abetted that person in the commission of the offense.

As you can see, the first requirement is that another person has committed the crime charged. Obviously, no one can be convicted of aiding and abetting the criminal acts of another if no crime was committed by the other person in the first place. But if you do find that a crime was committed, then you must consider whether the defendant aided or abetted the commission of the crime.

You may only find that Mr. Hirst aided and abetted another to commit a crime if the Government proves beyond a reasonable doubt that he willfully and knowingly associated himself in some way with the crime, and that he willfully and knowingly sought by some act to help make the crime succeed.

Participation in a crime is willful if action is taken voluntarily and intentionally, or, in the case of a failure to act, with the specific intent to do something which the law forbids or with the specific intent to fail to do something the law requires to be done; that is to say, with a bad purpose either to disobey or to disregard the law.

The mere presence of the defendant where a crime is being committed, even coupled with knowledge by him that a crime is being committed, or merely associating with others who were committing a crime is not sufficient to establish aiding and abetting. One who has no knowledge that a crime is being committed or is about to be committed but inadvertently does something that aids in the commission of the crime is not an aider and abettor. An aider and abettor must know that the crime is being committed and act in a way which is intended to bring about the success of the criminal venture.

To determine whether Mr. Hirst aided or abetted the commission of the crime with which he is charged, ask yourself these questions:

— Did he participate in the crime charged as something he wished to bring about?

— Did he associate himself with the criminal venture knowingly and willfully?

— Did he seek by his actions to make the criminal venture succeed?

If the answer to all three of these questions is “yes,” then Mr. Hirst is an aider and abettor. If, on the other hand, your answer to any one of these

> questions is "no," then Mr. Hirst is not an aider and abettor, and you must find him not guilty.

Willfully Causing a Crime

We respectfully request that the Court add the following paragraph to the end of its charge on willfully causing a crime:

> If you are persuaded beyond a reasonable doubt that the answer to both of these questions is "yes," with respect to a particular crime charged in the Indictment, then you may find that Mr. Hirst willfully caused that crime. However, if you find that either of these facts has not been proven beyond a reasonable doubt with respect to a crime, then you cannot find that he willfully caused the crime.

Adapted from L. Sand et al., Modern Federal Jury Instructions, Instruction 11-3.

Statute of Limitations

We ask that the Court add two charges relating to the statute of limitations, as follows:

> Certain counts contain a statute of limitations, which is a time limit for the Government to bring the charge. Count Four of the Indictment, which charges wire fraud, is governed by a five-year statute of limitations. If the Government does not file an indictment within five years of the crime of wire fraud being complete, you cannot convict a defendant of that crime. The Indictment in this case was filed on September 21, 2015. Accordingly, if you find that the Government has proven all of the elements of wire fraud beyond a reasonable doubt, but you find that all of the elements of wire fraud were met before September 21, 2010, you must find Mr. Hirst not guilty of wire fraud.
>
> Counts One and Three of the Indictment charge conspiracies. As I have instructed you, conspiracy is a separate crime under the law. Under the law, conspiracy has a five-year statute of limitations. If the Government does not file an indictment within five years of the termination of the conspiracy, you cannot convict a defendant of conspiracy. As I mentioned, the conspiracy to commit securities fraud requires an overt act. For such a conspiracy, the statute of limitations begins to run on the date of the last overt act. I have already given you a definition of overt act. The Indictment in this case filed on September 21, 2015. Accordingly, if you find that the last overt act in furtherance of the securities fraud conspiracy was committed before September 21, 2010, you must find Mr. Hirst not guilty of Count One.

> I also explained that wire fraud conspiracy, as charged in Count Three, does not require an overt act. For that count, you must consider whether the conspiracy extended beyond September 21, 2010. If it did not, you must find Mr. Hirst not guilty of Count Three.

We will also propose a special verdict sheet requesting a finding as to the statute of limitations.

Defense Theory of the Case

At the close of the evidence, we will submit a proposed charge relating to the defense theory of the case. *See United States v. Dove*, 916 F.2d 41, 47 (2d Cir. 1990) ("A criminal defendant is entitled to instructions relating to his theory of defense, for which there is some foundation in the evidence, no matter how tenuous the defense may appear to the trial court.").

For the convenience of Your Honor's clerk and the Government, we will make available a blacklined copy of the Court's proposed charge reflecting our requested changes.

We appreciate the Court's consideration.

Respectfully submitted,

/s/ *Michael Tremonte*

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